**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the matter of | ) | |
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| 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 | ) | MB Docket No. 02-277 |
| | ) | |
| Cross-Ownership of Broadcast Stations and Newspapers | ) | MM Docket No. 01-235 |
| | ) | |
| Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets | ) | MM Docket No. 01-317 |
| | ) | |
| Definition of Radio Markets | ) | MM Docket No. 00-244 |
| | ) | |

# COMMENTS OF VERIZON

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# COMMENTS OF VERIZON[1]

## Introduction

The Notice of Proposed Rulemaking seeks comment on recent court decisions interpreting Section 202(h) of the Act, which directs the Commission to examine its broadcast ownership rules every two years and repeal or modify any regulation "it determines to be no longer in the public interest."[2] Verizon is filing comments in this proceeding because the Commission's Section 202(h) obligations are "part of its regulatory reform review under section

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[1] The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc., listed in Attachment A.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996) ("1996 Act"); *see 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets,* Notice of Proposed Rulemaking, 17 FCC Rcd 18503, ¶¶ 18-19 (2002) ("*NPRM*").

11 of the Communications Act of 1934." 1996 Act, § 202(h). Thus, any decision the Commission makes on the Section 202(h) standard may well affect the Commission's Section 11 review of telecommunications regulations. Verizon's comments below are limited to the standard of review required by Section 11 (and thus, by extension, Section 202(h)), *see* NPRM ¶¶ 9-19, and will not address the specific policy questions regarding media ownership.

In conducting its biennial reviews pursuant to Section 202(h) and Section 11, the Commission should follow the guidance previously set by the D.C. Circuit, and retain a regulation "only insofar as it is necessary in, not merely consonant with, the public interest."[3] To further the deregulatory goals of the 1996 Act, Congress placed the burden on the Commission to justify retaining only those rules that are truly necessary. Accordingly, the Commission may not retail particular rules under the Act unless it finds, based on substantial record evidence, that they remain necessary to serve the public interest.

## I. UNDER THE EXPRESS TERMS OF THE ACT, THE COMMISSION MUST REVIEW AND ELIMINATE REGULATIONS UNLESS IT FINDS THEY ARE "NECESSARY IN THE PUBLIC INTEREST"

In 1996, Congress amended the Communications Act to "promote competition and *reduce* regulation," 1996 Act, Preamble (emphasis added) and to create a "pro-competitive, *de-regulatory* national policy framework."[4] One of the central pillars of this new framework was the addition of Section 11 of the Communications Act, which requires the Commission to review regulations every two years, and eliminate those that are "no longer necessary in the public interest as a result of meaningful competition." *See* 47 U.S.C. § 161. As the text of Section

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[3] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1050 (D.C. Cir. 2002) ("*Fox I*"). Although on request from the Commission, the court on rehearing agreed to remove this interpretation of the "necessary" standard from its opinion because it was not essential to the court's decision, *see Fox Television Stations, Inc. v. FCC*, 293 F.3d 537 (D.C. Cir. 2002) ("*Fox II*"), as discussed below, the court's reasoning still remains valid.

[4] S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. at 1 (1996) (emphasis added).

202(h) makes clear, the FCC's review of broadcast ownership rules is "part of its regulatory reform under Section 11." 1996 Act, § 202(h). Thus, by its terms, Section 202(h) extends the Section 11 biennial review process to the Commission's broadcast ownership rules.[5] Recent D.C. Circuit precedent, discussed below, establishes the proper framework for conducting the biennial review process under both Section 11 and Section 202(h).

There are three aspects of the binding statutory standard that are of particular importance:

a) *Only regulations that the Commission expressly finds remain "necessary" to serve the public interest may be retained.* Under the express terms of Section 11, the Commission may retain only those regulations that it determines are "*necessary* in the public interest." 47 U.S.C. § 161 (emphasis added). The term "necessary" is not defined in the Communications Act, and "[i]n the absence of such a definition, [a court] construe[s] a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The common or ordinary definition of "necessary" is "absolutely required," "indispensable," or "essential." *Merriam Webster's Collegiate Dictionary,* 774 (10th ed. 2001). Thus, under Section 11 (and Section 202(h)), the Commission must repeal any regulations that are not "absolutely required," "indispensable," or "essential." The review under Section 202(h) is "part of [the Commission's] regulatory reform under section 11," 1996 Act, § 202(h), and thus requires the same standard.

Both the Supreme Court and the D.C. Circuit Court have previously found that the word "necessary," when used in the other sections of the 1996 Act, must be read in accordance with its ordinary meaning. *See AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999); *GTE Service Corp. v. FCC*, 205 F.3d 416, 422 (D.C. Cir. 2000). In *Iowa Utilities Board*, the Supreme Court examined the Commission's interpretation of Section 251 of the Act, which requires the agency to consider

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[5] *See Section 257 Report to Congress*, 15 FCC Rcd 15376, ¶ 162 (2000); *see also 2000 Biennial Regulatory Review*, 16 FCC Rcd 1207, ¶¶ 12-13 (2001).

whether access to a proprietary network element is "necessary" before imposing unbundling requirements on that element. 47 U.S.C. § 251(d)(2)(A). The Commission had determined that an element was necessary to provide service if its denial would cause any increase in cost or decrease in quality. *Iowa Utils. Bd.*, 525 U.S. at 389. The Court rejected the Commission's expansive reading of the word "necessary," finding that this term requires "the FCC to apply *some* limiting standard, rationally related to the goals of the Act," and that the agency's broad interpretation was "simply not in accord with the ordinary and fair meaning of [the statute's] terms." *Id.* at 388, 390.

Likewise, when the D.C. Circuit subsequently addressed the meaning of the word "necessary" in a different section of the 1996 Act, the D.C. Circuit Court explained that:

> As is clear from the Court's judgment in *Iowa Utilities Board*, a statutory reference to 'necessary' must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.*, so as to limit "necessary" to that which is *required* to achieve a desired goal.

*GTE v. FCC*, 205 F.3d at 423 (emphasis added). The Court went on to say that the Commission was "almost cavalier" in suggesting that requirements that solely provided an efficiency benefit were "necessary," and that the "FCC cannot reasonably blind itself to statutory terms in the name of efficiency" since "*Chevron* deference does not bow to such unbridled agency action." *Id.* at 423-24.

Similarly, in *Fox I,* the D.C. Circuit Court concluded that the Commission had applied "too low a standard" in its 1998 biennial review pursuant to Section 202(h). *Fox I,* 280 F.3d at 1050. The panel found that: "The statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest." *Id.* In response to the Commission's petition for rehearing, the *Fox* court agreed to remove this discussion of the term "necessary" from its decision, to leave open for another day the question of the appropriate

legal standard for review in Section 202(h). However, the court refused the Commission's invitation to reverse this position and apply a lower standard. *Fox II*, 293 F.3d at 540. In addition, it did not remove that portion of its decision that stated that the statute "carries with it a presumption in favor of repealing or modifying" the rules.[6] And the reasoning from the *Fox I* decision remains valid.

The statutory language, when combined with the deregulatory purposes of the Act, plainly requires that a regulation may not be retained merely because it is "useful." Rather, to justify its continuance, the Commission must find a regulation is "necessary" – *i.e.*, "absolutely required" or "essential." This reasoning applies equally to review under Section 11 and Section 202(h).[7] In fact, to the extent any linguistic differences exit between Section 202(h) and Section 11, they require a *higher* burden for retention of regulations in the Section 11 context. That is because, while Section 202(h) does not repeat the "necessary in the public interest" language in its "shall repeal" command, Section 11 uses the "necessary in the public interest" language in *both* its "shall determine" and "shall repeal" clauses. *Compare* 1996 Act, § 202(h) *with* 47 U.S.C. § 161.[8]

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[6] *Fox I*, 280 F.3d at 1048; *see Fox II*, 293 F.3d at 540; *see also NPRM*, ¶¶ 3, 12, 19.

[7] Section 202(h) specifically states that the Commission's review under that section is part of the "regulatory reform under section 11." 1996 Act, § 202(h). And even absent the cross-reference in Section 202(h), traditional canons of statutory construction would require the Commission to apply the teachings of *Fox I* and its companion case, *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), in proceedings under both Section 11 and Section 202(h). *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (applying "the normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning").

[8] The Commission's rehearing petition in *Fox* relied heavily on the fact that Section 202(h) used the "necessary in the public interest" language in the review section, but only "public interest" language in the repeal section. *Fox Petition for Rehearing*, at 9-10; *see also Fox II*, 293 F.3d at 540. To the extent this distinction is important, it does not apply to Section 11, because Section 11 uses "necessary in the public interest" consistently throughout its operative provisions. *See* 47 U.S.C. § 161.

The Commission itself has recognized the limitations imposed on its discretion by the word "necessary." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3721-22 (1999). On remand in *Iowa Utilities Board*, the Commission abandoned its prior, broad reading of "necessary," which turned on whether access to a given element provided an economic benefit to carriers requesting access. Instead, the agency found that a proprietary network element is "necessary" only when its absence "would, as a practical, economic and operational matter, *preclude* [a carrier] from providing the services it seeks to offer." *Id.* at 3721 (emphasis in original). In other words, a "'necessary' element would, if withheld, *prevent* a carrier from offering service." *Id.* at 3722 (emphasis in original). There, the Commission recognized that the word "necessary" must be given its plain meaning when used as a limitation on regulatory authority.

The Commission has in the past argued that, "[t]erms such as 'necessary' and 'required' must be read in their statutory context and, so read, can reasonably be interpreted as meaning 'useful' or 'appropriate' rather than 'indispensable' or 'essential.'"[9] However, as stated above, the plain language of the statute, statutory context, and recent Supreme Court and D.C. Circuit precedent, as well as previous comments by the Commission itself, all make clear that the term "necessary" requires a much more stringent showing. In other words, as then-Commission Powell previously stated, "if the evidence in support of a rule is lacking, we must modify or eliminate it . . ."[10] Similarly, Commissioner Martin has noted that the term "necessary" "should

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[9] FCC Petition for Rehearing or Rehearing En Banc, *Fox Television Stations, Inc. v. FCC*, Nos. 00-1222, et al., at 5 (D.C. Cir. filed April 19, 2002) ("*Fox Petition for Rehearing*").

[10] *1998 Biennial Regulatory Review–Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, 13 FCC Rcd 25132, 25177 (1998) (Separate Statement of Commissioner Michael Powell) (emphasis added).

be read in accordance with its plain meaning," which "should mean something more than merely 'useful,' 'appropriate,' 'consistent with,' or 'important.'"[11]

Nor does a weak reading of the word "necessary" comport with the purpose of Section 11 or Section 202(h). The preamble to the 1996 Act states that its purpose is "to promote competition and *reduce regulation.*"[12] Section 11 itself is entitled "regulatory reform,"[13] and Section 202(h) is specifically made a part of the "regulatory reform" review mandated by Section 11. 1996 Act, § 202(h). The Supreme Court has observed that the 1996 Act was an "unusually important legislative enactment" and that its "primary purpose," was to "reduce regulation."[14] Interpreting Section 11 to impose no greater burden on the Commission than its preexisting duty to adopt rules only if they serve the "public interest" renders this bold deregulatory step a toothless tiger, and is inconsistent with the stated purpose of the 1996 Act in general and Section 11 in particular.

For that reason, the Commission cannot rely on judicial precedent broadly construing the term "necessary" when used as part of broad power-granting phrases such as "necessary and proper."[15] Although courts have determined that certain grants of authority in the 1934 Act

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[11] *See Verizon Wireless's Petition for Partial Forbearance From the CMRS Number Portability Obligation and Telephone Number Portability,* 17 FCC Rcd 14972, Separate Statement of Commissioner Martin at Section 2 (2002). Although Commissioner Martin's statements were directed toward Section 10, which governs forbearance, Section 10 is informed by the same deregulatory intent as Section 11. *See* 47 U.S.C. § 160.

[12] 1996 Act, Preamble (emphasis added); *see Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, 16 FCC Rcd 20641, ¶ 26 (2001) ("[W]e recognize that another of the Act's primary goals is to eliminate or avoid unnecessary, duplicative, or otherwise burdensome regulation").

[13] It is well established that the title of a provision may "shed light on some ambiguous word or phrase in the statute itself." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 483 (2001), *quoting Carter v. United States*, 530 U.S. 255, 267 (2000); *see also Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-529 (1947).

[14] *Reno v. ACLU*, 521 U.S. 844, 857 (1997).

[15] *See Fox Rehearing Petition*, at 5-6 (citing U.S. Const Art. I, Sec. 8).

utilizing the term "necessary" endow the Commission with expansive regulatory powers,[16] these provisions have no bearing on the proper construction of Section 11. The entire purpose of the 1934 Act was to *provide* the FCC with regulatory authority, while, as discussed above, this portion of the 1996 Act was focused on limiting Commission authority through mandatory *deregulation*. As prior court decisions make clear, when the word "necessary" is used as a limitation on agency authority, the agency is not free to shed statutory constraints through loose statutory construction.[17]

One of the most basic tenets of statutory construction is that a law must be read to give each word and provision effect. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (the duty of the court is "to give effect, if possible, to every clause and word of a statute," and the court may not adopt an interpretation that "emasculate[s] an entire section"). *See also* 2A Norman J. Singer, Statutes and Statutory Construction § 46.06 (6th ed. 2000). In enacting Section 11 and using the word "necessary," Congress intended to do more than simply repeat existing obligations under administrative law that apply to the Commission and all federal agencies. Given the fact that Section 11 (and thus Section 202(h)) is designed to *limit* agency authority, the agency cannot be allowed to interpret away its restrictions by loose construction of its terms.

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[16] *See, e.g.*, 47 U.S.C. § 201(b) (the Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act"); 47 U.S.C. 154(i) (the FCC "may . . . make such rules and regulations . . . not inconsistent with this Act, as may be necessary in the execution of its functions").

[17] When addressing an express statutory limitation on agency authority, one must be "[m]indful that Congress has acted to curtail" the agency's prerogatives. *Nat'l Rifle Ass'n v. Reno*, 216 F.3d 122, 132 (D.C. Cir. 2000), *cert. denied*, 533 U.S. 928 (2001). *See also Independent Ins. Agents of Am., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 838 F.2d 627, 632 (2d Cir. 1988) ("Courts construing statutes enacted specifically to prohibit agency action ought to be especially careful not to allow dubious arguments advanced by the agency in behalf of its proffered construction to thwart congressional intent expressed with reasonable clarity, under the guise of deferring to agency expertise on matters of minimal ambiguity").

b) *The Commission must bear the burden of demonstrating that rules remain necessary with substantial evidence.* The Commission cannot adopt a "wait and see" attitude toward its regulations – it must bear the burden of supplying clear evidence to justify their retention or repeal them.[18] In other words, as the Commission recognized in the context of another biennial review proceeding, "if we cannot identify a federal need for a regulation, we are not justified in maintaining such a requirement at the federal level."[19]

In addition, the Commission is not free to rest simply on its predictive judgment or speculation about the potential benefits of existing regulations as a basis for retaining them. *Fox I*, 280 F.3d at 1051. In order to retain a regulation, the Commission must both provide evidentiary support for the existence of an immediate problem and demonstrate that its regulation is an essential part of the solution. *See Fox I*, 280 F.3d at 1051; *Sinclair*, 284 F.3d at 152. Section 11 is a mandate for deregulation, not a charter for regulatory inertia. *See Fox I*, 280 F.3d at 1043; *Sinclair*, 284 F.3d at 159.

As the D.C. Circuit put it, "the statute imposed upon the Commission a duty to examine critically the [rule] and to retain it only if it continued to be necessary." *Fox I*, 280 F.3d at 1043. Similarly, in *Sinclair*, the same court noted that "section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules." 284 F.3d at 159. Indeed, the Commission itself, as well as individual Commissioners, has recognized that the Act places the burden on the Commission to justify retaining regulations. As then-Commissioner Powell put it:

> Frankly, I believe *the burden should be on us*, the FCC, to re-assess and re-validate the rule under either Section 11's biennial review or Section 10's

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[18] *See Fox I*, 280 F.3d at 1042 ("[t]he Commission's wait-and-see approach cannot be squared with its statutory mandate").

[19] *See 2000 Biennial Regulatory Review,* FNPRM, 16 FCC Rcd 19911, ¶ 207 (2001); *see also NPRM*, ¶¶ 19, 32 (expressly requesting submission of evidence regarding ownership rules).

> forbearance authority. ... *We must be prepared, if this is what the record evidence shows, to make a compelling and convincing case that the rule must be kept. If we cannot, or if the evidence in support of the rule is lacking, we must modify or eliminate it* and rely on competitive market forces or other mechanisms, such as the antitrust laws.

*1998 Biennial Regulatory Review–Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, 13 FCC Rcd 25132, 25177 (1998) (Separate Statement of Commissioner Michael Powell) (emphasis added). Similarly, in its order adopting reporting standards for information regarding local service competition and broadband deployment, the agency noted that both Section 10 and Section 11 served the "goal reflected in the 1996 Act of *reducing government regulation wherever possible*." *Local Competition and Broadband Reporting*, 15 FCC Rcd 7717, ¶ 5 (2000) (emphasis added).

c) *The Commission must review all of its regulations and reach its determination as to which remain necessary within the even-numbered year.* Both Section 202(h) and Section 11 unambiguously require the Commission to take specific action with regard to each of its regulations every two years. 47 U.S.C. § 161(a); 1996 Act, § 202(h). Section 11 states that, in "*every* even-numbered year" the Commission must "review *all* regulations issued under this Act" and "determine whether any such regulation is no longer necessary in the public interest." *Id.* § 161(a) (emphasis added). Once the Commission determines that a regulation is no longer necessary, it "shall repeal or modify" the regulation. *Id.* § 161(b). The operative language of Section 202(h) is almost identical.[20]

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[20] 1996 Act, § 202(h) ("The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest").

The requirement that the Commission review "*all* regulations" issued under the Act provides a clear mandate: The Commission must review each of its telecommunications regulations, and may not conduct a partial review of only some rules of its choosing.

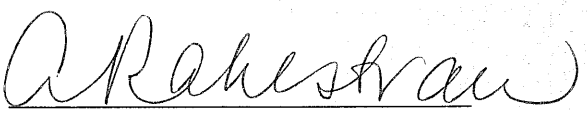
In addition, Section 11 requires the Commission must finish this "review" *and* make its "determinat[ion]" as to which rules remain necessary "*[i]n* every even-numbered year." 47 U.S.C. § 161(a) (emphasis added). The statute also commands that the "Effect of determination" that any regulation is no longer necessary requires action: "The Commission *shall repeal or modify* any regulation it determines to be no longer necessary in the public interest." Thus, the biennial review mandate consists of three elements: a review of *all* regulations, a determination regarding *all* regulations, and *repeal or modification* of any regulation as to which the Commission cannot bear its burden of demonstrating that the rule remains "necessary." Because the statute specifically states that the Commission must "review all regulations" *and* "*determine* whether any such regulation is no longer necessary" "*[i]n* every even-numbered year," the review, determination and repeal or modification must be completed within the even-numbered calendar year. 47 U.S.C. § 161 (emphasis added).

The Act by its terms makes it clear that it would thwart Congress' deregulatory goals to delay completion of these tasks beyond each even-numbered calendar year. Indeed, such delay would mean that regulations that cannot satisfy the stringent requirements of Section 11 remain on the books in direct contravention of the Congressional plan.

The Commission has stated in a previous biennial review proceeding that it need not "determine whether any such regulation is no longer necessary in the public interest" within the time set by the Act, but can merely "set[] forth the determinations that will form the basis for

further action."[21] However, this position is mistaken. As an initial matter, the Commission's overly expansive reading of the term "determine" to mean little more than "set the framework" is contrary to the plain meaning of the text. And the title of Section 161(b), "Effect of determination," clearly suggests that the action – repeal or modification – that must follow the necessary determination is ministerial in nature. Were the Commission permitted to indefinitely delay the repeal or modification of any rule determined to be no longer in the public interest, its biennial review obligation would be rendered a complete nullity. This simply cannot be the case.

Respectfully submitted,



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[21] *2000 Biennial Regulatory Review*, ¶¶ 5, 14.

# THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.